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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1442

DEAN FOODS COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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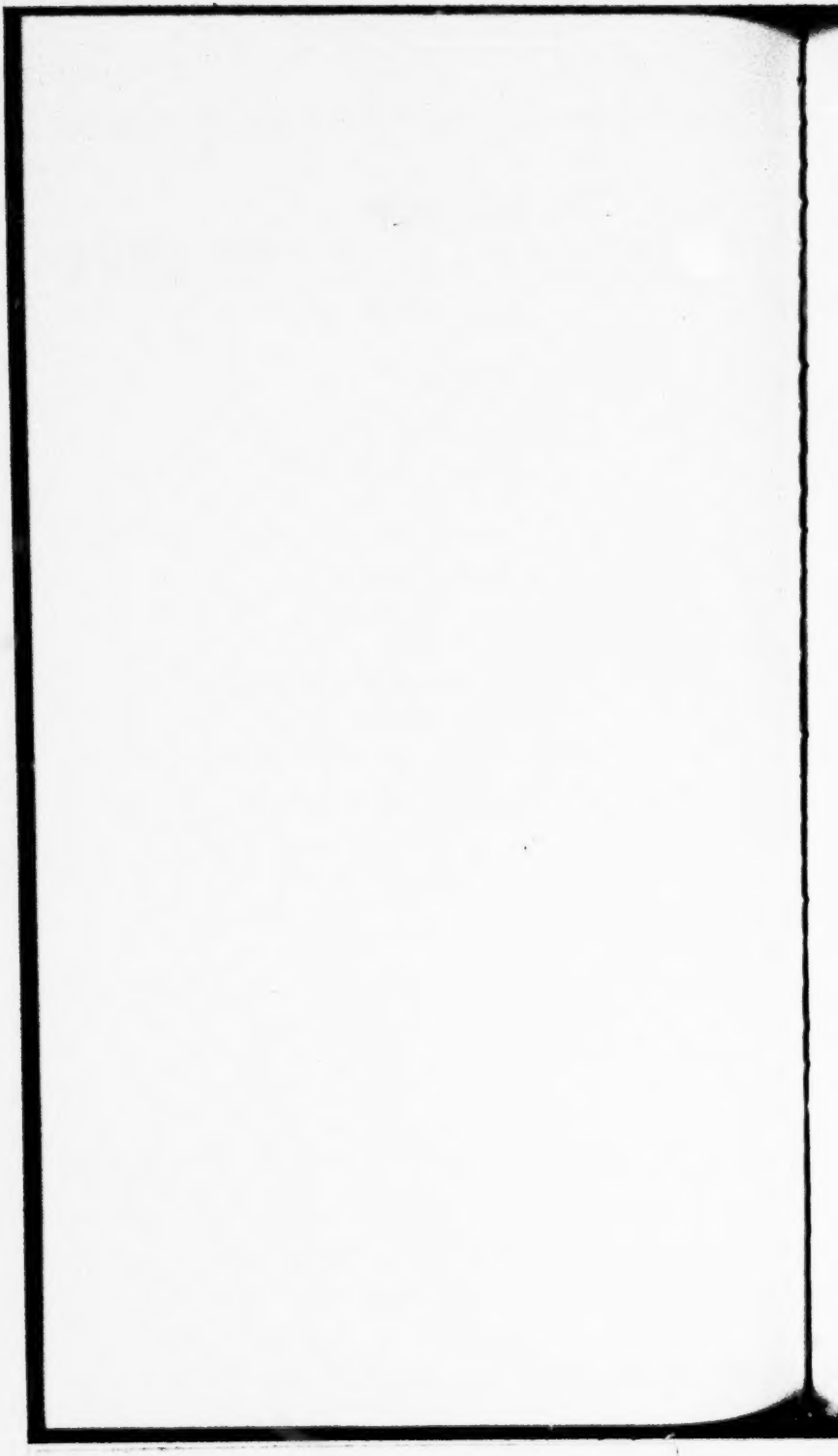

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To the United States Court of Appeals for the Sixth Circuit

The Dean Foods Company, Inc., Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on January 20, 1970 and granting enforcement of an Order issued against Petitioner[1] by the National Labor Relations Board.

[1] Petitioner herein was designated as "Respondent" before the court below; concurrently Petitioner herein was designated as "Respondent" or the "Employer" before the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B, *infra*, pp. A-2—A-4) is not yet officially reported. The conclusions of law and Order of the National Labor Relations Board is reported at 171 NLRB 60 (Appendix C, *infra*, pp. A-5—A-6). The decision of the Regional Director for the Twenty-Sixth Region of the National Labor Relations Board, out of which the incident case arises, is not officially reported (Appendix F, *infra*, pp. A-22—A-34).

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was rendered on January 20, 1970 (Appendix A, *infra*, p. A-1); and its opinion was entered the same day, that being specifically January 20, 1970 (Appendix B, *infra*, pp. A-2—A-4). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1) and Sec. 10 (e) and (f) of the National Labor Relations Act, as amended, 29 U. S. C., Sec. 160 (e) and (f).

QUESTIONS PRESENTED

1

Does the National Labor Relations Board have the authority to compel and order the Petitioner to recognize and bargain with a labor organization when it has not independently (or otherwise) reviewed the findings of fact, evidence presented, or conclusions at law of a subdelegatee?

2

Does the National Labor Relations Board have the authority to compel and order the Petitioner to recognize and

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bargain with a labor organization when it did not afford this Petitioner the opportunity to resolve evidentiary conflict by confrontation with, and cross-examination of, witnesses; nor even afford or conduct a hearing at any stage of these proceedings?

3

In the alternative, if it is found that the National Labor Relations Board exercised procedural due process required by law and therefore, afforded "fair" treatment to the issues and to the Petitioner, is the determination of the National Labor Relations Board that a fair election was held among the employees based on substantial evidence?

STATUTES INVOLVED

The National Labor Relations Act as amended (61 stat. 136; 72 stat. 945; 73 stat. 544; 29 U. S. C., Sec. 151 et seq.), insofar as is herein pertinent provide:

Section 7. "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, . . . and shall also have the right to refrain any and all such activities . . ."

Section 8 (a). "It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees. . . ."

Section 9 (c)(5)(d). "Whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification in the record of such investigation shall be

included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f) . . ." (emphasis supplied).

Section 10 (a). "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practices affecting commerce."

Section 10 (b). "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint" (emphasis supplied).

Section 10 (c). "The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in such unfair labor practice, then the Board shall state its finding of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of the Act." (Emphasis supplied.)

Section 10 (e). "The findings of the Board with respect to questions of fact if supported by substantial evidence of

the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction to the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence be taken before the Board, its member, agent, or agency and to be made a part of the record . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive in its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of title 28." (Emphasis supplied.)

STATEMENT OF THE CASE

In substantial respects the facts of this matter are not in dispute save one critical issue.[2] It was mutually agreed between these parties that on July 20, 1967, pursuant to a Stipulation for Certification upon Consent Election, the Regional Director for the Twenty-Sixth Region of the National Labor Relations Board residing in Memphis, Tennessee would conduct and hold an election among the Petitioner's employees in a unit again reached upon Stipulation and agreement between these parties (J. A., pp. 5, 6).[3] The results of that election disclosed that twenty-three (23) employees cast respective votes for the petitioning labor organization, while seventeen (17) employees cast their respective ballots against it; there also remained five (5) challenged ballots in this close determination (J. A., p. 7).

Because of alleged campaign trickery, and other coercive conduct by the labor organization involved, this Petitioner did timely file Objections to this election (Pa. 9, 10).

Admittedly, Section 102.69 (c), 29 C. F. R. 102.69 (c) of the Board's Rules and Regulations formulated the procedure upon which an investigation of these Objections could be conducted by the Regional Director for the Twenty-Sixth Region.

In this respect, it is critical for the parties and this Court to distinguish the difference between a "Stipulation

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[2] The factual area of disagreement remaining is whether or not the "Board" itself actually reviewed the record of this matter before the Regional Director; the Petitioner contends the National Labor Relations Board did not independently review the evidence presented.

[3] "J. A." refers to the printed Joint Appendix presented to the court below.

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for Certification upon Consent Election" agreement which is governed by the procedures of Section 102.62 (b) of the Board's Rules and Regulations to that merely of a "Consent Election" which is restricted by the limitations imposed in Section 102.62 (a) of the Board's Rules and Regulations.[4]

It is, therefore, noted in the latter consent agreement procedures that "the rulings and determinations by the

[4] Sec. 102.62 Consent-election agreements.—(a) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into a consent-election agreement leading to a determination by the regional director of the facts ascertained after such consent election. Such agreement shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such consent election shall be consistent with the method followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 **except that the rulings and determinations by the regional director of the results thereof shall be final,** and the regional director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, **enter into an agreement providing** for a waiver of hearing and **a consent election leading to a determination by the Board of the facts ascertained after such consent election,** if such a determination is necessary. Such agreement shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 (emphasis supplied).

Regional Director of the results thereof shall be final." Conversely, under the "Stipulation for Certification upon Consent Election," the parties "enter into an agreement providing . . . a consent election leading to a determination by the Board of the facts ascertained after such consent election . . ." Simply expressed, these parties are bound by facts ascertained after the election, which are determined by the Board; **not** by the final determinations of the Regional Director of the Twenty-Sixth Region residing in Memphis, Tennessee.

The Petitioner will hereafter show that this case has proceeded with the treatment of the Regional Director's rulings and determinations as final; and conversely, that the Board, upon whom Congress alone vested this responsibility, did neither see, consider, ascertain, or determine the facts of this matter. The result being that the Respondent's Order against this company is based upon findings of fact and conclusions of law rendered with binding finality by only a subdelegatee, i. e., the Regional Director.

This Regional Director's Report and Recommendations on Objections issued on September 1, 1967, and summarily concluded that the Company's Objection were without merit and recommended that they be overruled (Appendix F, *infra*, pp. A-22—A-34). Thereafter, the National Labor Relations Board utilized its expedited procedure to find that this company had violated a federal statute and had engaged in unfair labor practices which Order, on January 20, 1970, upon Petition for Enforcement by the National Labor Relations Board received judicial condonation and enforcement. This Petitioner hereby questions not only judicial enforcement of such an Order, but more pointedly, the expedited procedure which is hereafter explained.

On September 7, 1967, the Petitioner filed timely and appropriate exceptions to the Regional Director's Report

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and Recommendation on said Objections and specifically, requested review by the National Labor Relations Board of the Regional Director's Report (J. A., pp. 23-32). Thereafter, on October 20, 1967, the Board issued its Decision and Certification of Representative which literally adopted the Regional Director's findings and recommendations; concluding that no substantial issue of fact or law existed that would warrant the reversal of the Regional Director's findings and recommendations or further require a hearing of this matter (Appendix E, *infra*, pp. A-19—A-21). Accordingly, the Respondent certified the petitioning labor organization as representative of these employees. Thereafter, on November 7, 1967, the Petitioner filed a Request to Review and Reconsider the Board's action and decision as rendered (J. A., pp. 35-41). This request was duly considered and denied on November 17, 1967 (J. A., p. 42).

On December 1, 1967, the then ostensibly certified labor organization filed an unfair labor practice charge against this company alleging that it had refused to bargain collectively with the union (J. A., p. 43). Thereafter, a complaint issued from the office of the General Counsel of the National Labor Relations Board and a notice of hearing distributed to these parties; the complaint against the company alleged violations of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act (J. A., pp. 44-48). However, before a hearing of this cause was afforded to these parties, Counsel for General Counsel for the National Labor Relations Board on January 5, 1958, submitted a Motion for Judgment on the Pleadings only (J. A., pp. 53-56). The Board's representative therein asserted that the violations alleged in the Complaint against this company were conclusively established and that no hearing was necessary or required.

On July 9, 1968, a duly appointed Trial Examiner of the National Labor Relations Board, one Charles W.

Schneider, issued an Order to Show Cause on the Motion for Judgment on the Pleadings by which the company was directed to show cause on or before January 25, 1968, as to whether or not this expedited treatment should be granted (J. A., p. 57). In response, the Petitioner on January 23, 1968, filed a response to General Counsel's Motion for Judgment on the Pleadings, and further, attached an appropriate Motion to Produce Evidence directed at certain documents and affidavits possessed and maintained by the Regional Director for the Twenty-Sixth Region in Memphis, Tennessee and asserting that said documents and affidavits be produced and made a part of the record before the Trial Examiner (J. A., pp. 58-60).

Both the Petitioner's Motion to Produce Evidence concerning admittedly absent documents and affidavits and its response to the Motion for Judgment on the Pleadings were rejected and denied; conversely, the request for expedited treatment by General Counsel of the National Labor Relations Board was held appropriate by the Trial Examiner's Decision that issued on February 16, 1968 (Appendix D, *infra*, pp. A-7—A-18).

Thereafter, on March 17, 1968, this company filed timely Exceptions to the action and legal determinations taken by the appointed Trial Examiner of the National Labor Relations Board (J. A., pp. 74-76). As provided under Section 3 (b) of the National Labor Relations Act, the Board delegated its powers in this matter to a three member panel, who adopted in their entirety the Trial Examiner's findings, conclusions, and recommendations and held in substance that the Petitioner had violated Section 8 (a) (1) and (5) and the National Labor Relations Act (Appendix C, *infra*, pp. A-5—A-6) as amended. It thereupon ordered the Petitioner to take certain affirmative action which is synonymously reflected in the Trial Examiner's Decision (J. A., pp. 70-72).

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Approximately one year later, the National Labor Relations Board applied for enforcement of its Order against this company to United States Court of Appeals for the Sixth Circuit and thereafter, in a per curiam opinion of that Court, the Board's application was granted without modification (Appendix B, *infra*).

REASONS FOR GRANTING THE WRIT

The Court Below Has Approved Expedited Procedures Now Used by the National Labor Relations Board That Are Contrary to the Intent of Congress, Contrary to the Act, and Contrary to the National Interest.

This Petitioner feels as though it has pursued its rights before a local magistrate setting in a rural area of certain parts of these United States and has thereafter, been treated to judicial consideration, procedures, and the same due process at law that is often compared to an animal indigenous to the Commonwealth of Australia. Although Petitioner quickly recognizes that how it "feels" in this matter remains irrelevant, that conversely, the issues raised by this Petitioner effect not only it, but all other parties who "consent" to have the rights of their employees expeditiously and peaceably determined. To "consent" to such a determination clearly is an objective of the Act[5] and effectuates its purpose, as well as, those of Congress[6] and those who administer the delicate balance between the great socio-economic interests of these United States.

Petitioner submits that the National Labor Relations Board would be the first to agree that to inhibit this

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[5] "It is the purpose and policy of this Act . . . to provide orderly and peaceful procedures for preventing the interference by either (labor and management) with the legitimate rights of the other." 29 U. S. C., Sec. 151 (b).

[6] Observe remarks of Senator Morse about, "refusal of a recalcitrant employer or union . . . to consent." Congressional record, Senate, June 5, 1947, 93 Cong. Rec. 6611.

"consent" factor would produce manifold procedural problems and burdens to the federal agency vested with maintaining stability between labor and management.

Section 9 (c) (1) of the Act provides that upon a petition filed, a question of representation exists, the Board must resolve it through an election by secret ballot. The election details are usually left to the Board. The National Labor Relations Board has asserted that said elections are conducted in accordance with strict standards designated to assure that the participating employees have an opportunity to determine and register a free and untrammeled choice in the selection of a bargaining representative.

Any party to an election who believes that the standards have not been met, may file timely objections to the election with the Regional Director under whose supervision said election was held. In that event, the Regional Director may as a situation warrants either make an administrative investigation of the objections or hold a formal hearing to develop a record as a basis for his decision. If the election was held pursuant to a consent election agreement authorizing the determination by the Regional Director alone, the Regional Director will then issue a decision on the objections which is final (Section 102.62 (a)).

Conversely, if the election was held pursuant to a stipulated consent election agreement authorizing a determination by the Board rather than the Regional Director, a subordinate agent, the Regional Director will then issue a Report on Objections which is then subject to exceptions by the parties and by the decision by the Board.[7]

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[7] Board's Rules and Regulations, Section 102.62 (b), 102.69 (c). The only **possible** means to assure determination of fact and law by the Board and **not** by the subordinate Regional determinative process is to "consent" under this rule, e. g., Section 102.62 (b).

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However, if the election was directed by the Board without "consent", the Regional Director is required to hold an initial hearing and an investigation of the issues raised by the Petition as filed and thereafter, upon objections being filed, make a report on the objections, subject to exceptions with the final decision to again be made by the Board, or secondly, dispose of the issues by issuing a decision, which again is then subject to review by the Board.[8]

It is remembered that the employees of this Petitioner were involved in this election process in the year 1967. It is reported[9] that 557,822 employees voted in Board conducted elections during this period of time. During this year, the Board conducted 7,882 elections among employees to determine their choice of a bargaining representative. Seventy-Seven per cent of these elections (6,324) were conducted upon a "consent" arrangement among the parties.

The Petitioner submits that without a cooperative public policy and lawful attitude of parties before the National Labor Relations Board, that reflects mutual consent to utilize its processes, a totally catastrophic procedural and economic result will occur. It follows, therefore, and the Petitioner submits that anything that deters from such voluntary "consent" results in protracted circumstances that do not effectuate the policies of the Act, nor further the national interest. "Arbitrary power"[10] when experienced or identified gives rise to anarchy.

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[8] Board's Rules and Regulations. Section 102.69 (c), Section 102.69 (e).

[9] Thirty Second Annual Report of the National Labor Relations Board; fiscal year 1967, page 11 (G. P. O. 1968).

[10] The only means an Employer can obtain judicial review of an issue directed at choice of the bargaining representative is to tacitly (and with premeditation, knowingly) violate the National Labor Relations Act by refusing to meet and bargain with the labor organization involved. In comparison, the Labor or-

It is lastly noted that of the 2,265 representation hearings conducted by the Board in 1967, only 173 such hearings were held concerning objections to conduct affecting the results of said elections.[11]

This Petitioner, by consenting to hold the election before the National Labor Relations Board, did so only on the condition (and for the reason) that all questions of fact and law would be determined by the Board and its Congressionally ratified Members and not by a subordinate official, the Regional Director for the Twenty-Sixth Region of Memphis, Tennessee. Thereafter, no hearing was afforded to these parties on timely objections filed.

Procedural error is compounded when the National Labor Relations Board limited its perusal of this circumstance to consider only (1), the Employer's objections, (2) the Regional Director's Report and (3) the Employer's exceptions thereto (J. A., p. 34; Appendix E, pp. A-19—A-21) without consideration or observation of any evidence, testimonial or exhibitory, submitted to the subdelegatee.

Thereafter, a duly appointed Trial Examiner also procedurally refrained from evaluating evidence by confining his determination to merely a judgment on the pleadings.

The fact that the Petitioner was denied a hearing in this case, would be directly contrary to decisions issued by other distinguished court of appeals. **NLRB v. Capital Bakers, Inc.** (CA-3, 1965), 351 F. 2d 45; **NLRB v. Trancoa**

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ganization has absolutely no means to obtain review by the federal courts under the Act and present Board procedures. "Arbitrary Power" is defined by **Black's Law Dictionary**, West Publishing Co., 4th Edition, 1951, p. 134 to be, "Power to act according to one's own will; especially, applicable to power conferred on an administrative officer who is not furnished any adequate determining principle. **Fox Film Corporation v. Trumbull**, D. C. Conn., 7 F. 2d 715, 727."

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Chemical Corporation (CA-1, 1962), 303 F. 2d 456; **Home Town Food, Inc. v. NLRB** (CA-5, 1967), 379 F. 2d 241; **Graphic Arts Finishing Co. v. NLRB** (CA-4, 1967), 380 F. 2d 893; **Sonoco Products Corp. v. NLRB** (CA-9, 1968), 399 F. 2d 835; **Bausch & Lomb, Inc. v. NLRB** (CA-2, 1968), 404 F. 2d 1222. This procedure was thereafter expeditiously adopted by the National Labor Relations Board without question and apparently, confirmed by the United States Court of Appeals for the Sixth Circuit without comment.[12]

In summary, it is therefore the Petitioner's purpose to have such expedited procedure stopped in deference to due process of law. The Federal Courts should not (and in other circumstances do not) condone the use of arbitrary power by administrative agencies; secondly, the party before the National Labor Relations Board should not be required to intentionally violate the mandates of the Act to secure judicial, if not proper administrative, evaluation of the issues raised below; and thirdly, this matter results in a direct deterioration of the "consent" procedures which historically have proven to insure industrial peace among both labor and management, and certainly to the benefit, and in the interest, of the National Labor Relations Board itself.

The Petitioner therefore, respectfully submits that for the above three reasons, this Petition for Writ of Cer-

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[12] This petitioner before court below pointed directly at this defect in its submitted Answer to Application for Enforcement of Order of the National Labor Relations Board and Cross-Petition to Review and Set Aside Said Order and thereafter, in its brief submitted to the court. (This received expeditious response from the appellate division of the National Labor Relations Board by form of a reply brief raised in this regard.) The thrust of the National Labor Relations Board reply brief asserted that "the Board's rules entitled this company to obtain Board review on the merits of the Director's report" (reply brief for the National Labor Relations Board, on application for Enforcement, page 3). The record does not support the assertion of the National Labor Relations Board in this respect either.

tiorari warrants due consideration, evaluation, and the subsequent voice of this Court.

The Decision Below Is In Conflict With the Decision of the Second Circuit With Regard to These Expedited Procedures Promulgated by the National Labor Relations Board.

The Second Circuit Court of Appeals in **Pepsi Cola Bottling Company v. NLRB**, 409 F. 2d 676 (CA-2, March, 1969) stated:

> "The National Labor Relations Board has adopted a rule against 'relitigation' which has the effect of denying to a litigant, in an unfair labor practice action, review by the Board of decisions made by the Regional Director in a prior representation proceedings, even if that prior decision is at the very heart of the unfair labor practice dispute . . . we find the Board's action pursuant to that rule unjustified in this case."

The Second Circuit therefore refused to enforce an Order of the Board by observing that the Company complained that the Board never independently reviewed the Regional Director's conclusion on the issues raised rather it "simply swallowed his decision into its own" (409 F. 2d at 678).

This Petitioner has been treated to an identical expedited procedure which has, by the court's acquiescence and silence, been approved by the United States Court of Appeals for the Sixth Circuit in diametric conflict to the above decided judicial rejection of the Board's expedited processes. The Second Circuit articulately concluded that, "Such deference to the Regional Director was not intended by Congress. It was decided that the Board itself must rule a litigant has committed an unfair labor practice" *Id.*

The record reflects that this Petitioner repeatedly requested the Board and the Court below to require the Board not to "shut off the parties rights to produce evi-

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dence or conduct cross-examination material to the issues". See, **National Labor Relations Board v. Indiana and Michigan Electric Company**, 318 U. S. 9, 28; 63 S. Ct. 395, 405 (1943) and **NLRB v. Smith Industries, Inc.**, 403 F. 2d 899 (CA-5, 1968).

In this matter, the Board observed **no evidence** and therefore, determined nothing. No testimony, whether submitted by affidavit or through recorded transcript before a delegated hearing officer, was observed by the Respondent below. In this respect, compare **NLRB v. The Process Corporation**, 412 F. 2d 215 (CA-7, 1969).

Briefly, the record below reflects that (1) no hearing was ever conducted at any stage of the proceedings; that (2) all issues of fact were determined on an *ex parte* investigation where diametrically inopposite and conflicting evidence was presented by the parties; that (3) thereafter, the Regional Director for the Twenty-Sixth Region, clearly a subdelegatee, dismissed each and all of these objections, and by necessity, making the credibility determinations required concerning the relative assertions of the parties before him; that (4) the National Labor Relations Board reviewed not the evidence presented, but rather its inquiry was directed only as to whether or not substantial "issues" had been raised and demonstrated an abrogation of its statutory responsibility to considering only, "The Employer's Objections, the Regional Director's Report, and the Employer's exceptions thereto" (J. A., p. 34 and footnote 1 thereon); that (5) upon submission of the alleged unfair labor practice to a Trial Examiner, again a subdelegatee of the Board, Petitioner was treated to summary judgment on the pleadings with the finding of the Trial Examiner that "it is clear that all material issues of **fact** and law in this regard have been decided by the Board" (J. A., p. 66); and that (6) although the Board admittedly could not consider "issues of fact"

without evidence before it, it thereafter on May 17, 1968, issued a mimeographed form Order which contains only the relevant statement that "The Board has considered the Trial Examiner's Decision, exceptions and **the entire record of this case** and hereby adopts the Trial Examiner's findings, conclusions, and recommendations" (J. A., p. 76); emphasis supplied.

It must be remembered that which the Board characterizes as "the entire record of this case" actually consisted only of the Trial Examiner's decision (2) the Exceptions of the respondent and (3) the formal pleadings presented to the Trial Examiner upon which he granted judgment and no more. Clearly, the Board did not determine the facts because the facts (evidence[13] and testimony) were not presented to it under the expedited procedures that **Pepsi Cola**, *supra*, has now rejected.

It is this procedure that has caused conflict in the Circuit Courts and which this Petitioner hereby requests to be resolved by the Court herein.

This Petitioner is not unmindful of the fact that this Court has clearly determined that "in the absence of proof by the employer that there has been prejudice to the fairness of the election, such trivial irregularities of administrative procedure do not afford a basis of denying an enforcement to an otherwise valid Board Order." **National Labor Relations Board v. Mattison Machine Works**, 81 S. Ct. 434, 435. The circumstance of this case do not find the Petitioner making its plea below empty handed.

The company came forward with evidence that an employee discussing a memorandum distributed by the labor organization shortly before the election was conducted, said that he was going to vote against the Union, but

[13] Even the Regional Director excluded documentary exhibits presented to support the Respondent's objections (See Motion of Respondent to Produce Evidence, J. A., pp. 59-60).

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after he saw the memorandum, he changed his mind. Additional evidence was submitted that another employee, again referring to literature distributed by the Union stated, "We got it, we photostated it, and distributed it through the Union meeting . . . This is what really hurt you" (J. A., p. 14). Such evidence was summarily disregarded by the Board's subdelegatee upon presentation, and upon an *ex parte* basis, he rendered decisive credibility findings in this respect.[14]

The Petitioner believes, and based upon the guidance of this Court submits, that the National Labor Relations Board is an agency with the duties and Constitutional responsibility recognized between the Civil Rights Commission as considered by this Court in **Hannah v. Larche**, 363 U. S. 480, ... S. Ct. 1502, and the Constitutional responsibilities of the Labor Management Commission of Inquiry of the State of Louisiana subject to this Court's consideration in **Jenkins v. McKeithen**, 89 S. Ct. 1843. Therein Mr. Justice Marshall, upon delivery of the opinion of the Court states: "The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause;" citing **Morgan v. United States**, 304 U. S. at 18, 58 S. Ct. at 776, **Baltimore and Ohio Railroad Company v. United States**, 289 U. S. 349, 368-369, 56 S. Ct. 797, 807. That further, "we only hold that a person's right to present his case should not be left to the unfettered discretion of the Commission". **Jenkins**, *supra*, 86 S. Ct. at 1853. Therein, both Mr. Justice Douglas and Mr. Justice Black concur with the majority by finding that this Commission does not afford procedural protec-

[14] The Board in its brief to the court below admits that if "A Regional Director ignores material evidence submitted by the objector, relies on conflicting evidence presented by another party, or otherwise makes crucial factual determinations on an *ex parte* basis, material factual issues may be raised and a hearing is required. (Brief for the National Labor Relations Board to United States Court for Sixth Circuit, pp. 23, 24.)

tion that the Bill of Rights provides and therefore denies due process of law.

It is with interest that the Petitioner finds that dissenting Justice Harlan, Justice Stewart, and Justice White also frame their evaluation of this agency of the state of Louisiana in a context that supports this Writ for Certiorari presented.

Specifically, the dissent in evaluating the Constitutional protections required by the majority of the Court of this state agency relate, "The Commission thus bears a close resemblance to certain Federal administrative agencies." 89 S. Ct. at 1858. However, the dissent distinguishes this specific commission from being afforded the full scope of due process by concluding that the agency ". . . plays only a preliminary role designed, in the usual course of events, to initiate a subsequent formal procedure in which the accused will enjoy the full panoply of procedural safeguards. For this reason, and because such agencies cannot otherwise practicably pursue their investigative functions, they have not been required to follow 'adjudication' procedures" *Id.*

Thereafter, and possibly more importantly, the dissenting members of the Court evaluate the nature and Constitutional responsibilities of the Federal Trade Commission and Securities and Exchange Commission; comparing each again to the administrative bodies in **Hannah**, *supra*, and the agency of the State of Louisiana.

Unfortunately, perhaps for the brief writer, nothing was said concerning the Respondent herein, the National Labor Relations Board and the Constitutional responsibility it must affect to, and upon, the parties before it. Conversely, the Petitioner submits that it is indeed fortunate and supports the requested granting of this Writ for Certiorari, that the Court's pronouncements concern-

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ing procedural due process of the National Labor Relations Board remain vague, if not absent entirely. Petitioner therefore proposes such Constitutional standards are ripe for consideration by the Court to the ultimate benefit of the Respondent, of labor, of management, and of course, the herein aggrieved Petitioner.

In summary, the Petitioner submits that because the National Labor Relations Board has not actually considered questions of fact or the evidence presented, that its Order is not entitled to judicial approval or enforcement, and that the decision below remains in conflict with the decision of the Second Circuit with regard to the expedited procedures now promulgated by the National Labor Relations Board.

CONCLUSION

For the reasons above expressed, specifically including the conflict of Circuits and the area remaining between this Court's determination in **Hannah**, *supra*, and its more recent decision in **Jenkins**, *supra*, the Petitioner submits that a Petition for Writ of Certiorari in the circumstances of this case should be granted.

Respectfully submitted

FOWLER, BRACKHAHN, YOUNG & PERL

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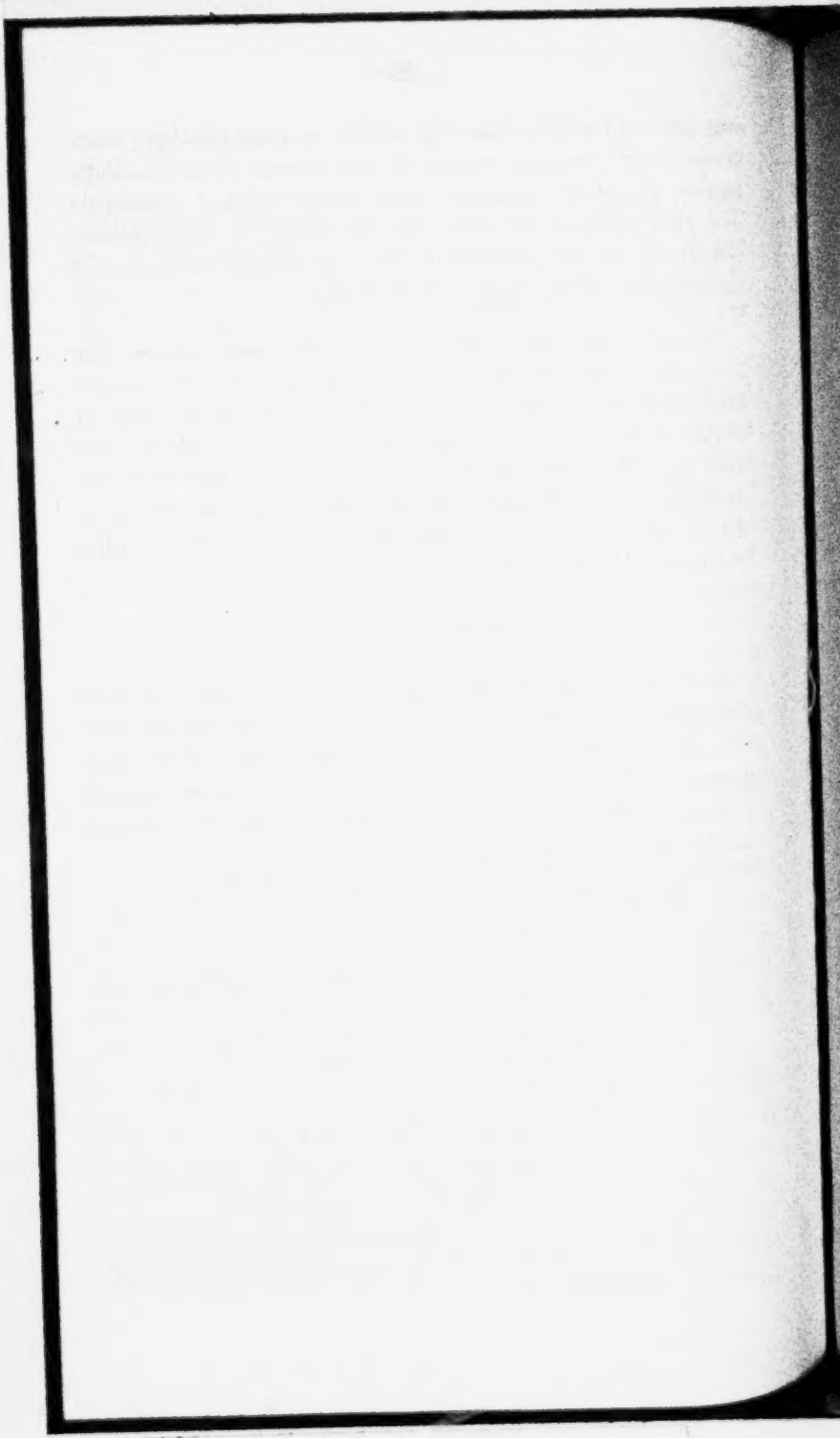

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APPENDIX A

United States Court of Appeals
For the Sixth Circuit

National Labor Relations Board,
Petitioner,

vs.

Dean Foods Company, Inc.,
Respondent.

No. 19,496.

ORDER

Before: Edwards, Peck and McCree, Circuit Judges.

On petition to enforce and cross-petition to review and set aside an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition for enforcement of the order of the National Labor Relations Board be and the same is granted and the order is hereby enforced.

It is further ordered that Petitioner recover from Respondent the costs on appeal as itemized below.

Entered by order of the Court.

Carl W. Reuss
Clerk

Costs: To be recovered by Petitioner
printing $450.55

APPENDIX B

No. 19496

United States Court of Appeals
For the Sixth Circuit

National Labor Relations Board, Petitioner, v. Dean Foods Company, Inc., Respondent.	On Petition for Enforcement of an Order of the National Labor Relations Board.

Decided January 20, 1970.

Before: Edwards, Peck and McCree, Circuit Judges.

Per Curiam. In this action petitioner seeks enforcement of its order reported at 171 NLRB No. 60, pursuant to the provisions of the National Labor Relations Act, as amended, 29 U. S. C., §§ 151, et seq. There is also before the Court a cross-petition of the respondent asking that the order of the Board be reviewed and set aside.

The Board found that the respondent (hereinafter usually the "Company") violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the union here involved which had been certified pursuant to an election. The Company admits its refusal to bargain, challenging the certification on the basis of the invalidity of the election. The issue here presented is whether in overruling the Company's objections to the election the Board acted arbitrarily and capriciously and abused the discretion delegated to it by Congress in matters relating to representation election proceedings. *N. L. R. B. v. Waterman*

SS. Corp., 309 U. S. 206, 226 (1940); *N. L. R. B. v. S. H. Kress & Co.*, 194 F. 2d 444, 446 (6th Cir. 1952). Where a party seeks to overturn the results of such an election, the burden is on that party to show that the election was not fairly conducted (*N. L. R. B. v. Mattison Machine Works*, 365 U. S. 123, 124 (1961)), and thus more narrowly stated the issue here is whether the Company has sustained its burden of proving the invalidity of the election in question.

Some 48 days prior to the election the Company issued a memorandum to "All Supervisory Personnel" announcing a liberalization of vacation schedules for all non-union salaried employees, and specifically directing that the content of the memorandum remain confidential "since this change in our vacation plan could have an adverse effect on labor negotiations." Although this document apparently was available to the union at or soon after its promulgation, the union did not circulate it until two days before the election. On the next day it placed a copy in each employee's time card slot, but since only seven employees worked that day it is contended that the balance of the fifty employees did not see the document, upon which appeared at the top "THIS IS WHAT THE CO. THINKS OF US", until election day. Whatever issues may have existed concerning the manner in which the memorandum initially became available to the union become immaterial in view of the statement in the Company's exceptions to the Regional Director's Report on Objections to the effect that it was "not interested, nor . . . concerned with, who or what individual misappropriated the Company's confidential memorandum."

The Board has decreed that it will set aside representation elections on the basis of campaign propaganda only where that propaganda (1) misrepresents a material fact, involving a substantial departure from the truth; (2) is

timed so that the other party is prevented from making an effective reply; and (3) may reasonably be expected to have a significant impact on the election. *Hollywood Ceramics, Inc.*, 140 NLRB 221, 224 (1962). These criteria have been generally recognized by this Court in *N. L. R. B. v. Allen Mfg. Co.*, 364 F. 2d 814, 816 (6th Cir. 1966); and in *N. L. R. B. v. Louisville Chair Co.*, 385 F. 2d 922, 927 (6th Cir. 1967), *cert. denied*, 390 U. S. 1013 (1968); *see also, Anchor Mfg. Co. v. N. L. R. B.*, 300 F. 2d 301, 303 (5th Cir. 1962). In the last three cases, the courts were dealing with a situation in which the propaganda contained a false statement, a claimed misrepresentation based on an ambiguity, and what was assumed for the purpose of the opinion to be a misrepresentation, and in each it was held that the election was valid in spite of the distribution of the accused material.

The present case is novel in that the Company can scarcely claim that the document circulated contains any false statement, since it admits its authenticity as a company prepared memorandum. With reference to this document, the Company states, "Unfortunately, although inadvertently, the memorandum on its face connotes a surreptitious flavor to the document and its contents." If such a connotation in fact exists, it must be remembered that the language employed was chosen by the respondent itself.

On this record taken as a whole, the Board's finding that the circulation of the memorandum was not so timed that the Company was prevented from making an effective reply is sustained by substantial evidence.

The petition of the National Labor Relations Board for enforcement of its order is hereby granted, and the prayer of the cross-petition denied.

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APPENDIX C

171 NLRB No. 60 D-947
Memphis, Tenn.

United States of America
Before the National Labor Relations Board

Dean Foods Company, Inc. and Oil, Chemical and Atomic Workers International Union, AFL-CIO	Case No. 26-CA-2949

DECISION AND ORDER

On February 16, 1968, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and hereby orders that the Respondent Dean Foods Company, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified.

1. Delete from paragraph 2(b) of the Trial Examiner's Recommended Order that part thereof which reads "to be furnished" and substitute therefore "provided. . . ."

Dated, Washington, D. C. May 17, 1968.

.....
John H. Fanning
Member

.....
Howard Jenkins, Jr.
Member

.....
Sam Zagoria
Member

(Seal) National Labor Relations Board

APPENDIX D

TXD-111-68
Memphis, Tenn.

United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

Dean Foods Company, Inc. and Oil, Chemical and Atomic Workers International Union, AFL-CIO	Case No. 26-CA-2949

Roger B. Holmes, Esq., for the General Counsel.

Fowler, Brackhahn & Young, Memphis, Tenn., by Newell N. Fowler, Esq. and Richard A. Brackhahn, Esq., for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

The Representation Proceeding[1]

Charles W. Schneider, Trial Examiner: Upon petition for certification as collective-bargaining representative filed by Oil, Chemical and Atomic Workers International Union, AFL-CIO, herein called the Union, the Regional

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[1] Administrative or official notice is taken of the Representation proceeding, Case No. 26-RC-2925. See Section 9(d) of the National Labor Relations Act.

Director for Region 26 of the Board on May 31, 1967, approved a Stipulation for Certification Upon Consent Election executed by the Dean Foods Company, Inc., Memphis, Tennessee, herein called the Respondent, and by the Union. The appropriate bargaining unit was stipulated to be the unit set out hereinafter.

Pursuant to the stipulation, an election by secret ballot was conducted on July 20, 1967, under the direction and supervision of said Regional Director. There were approximately 50 eligible voters; 45 cast ballots, of which 23 were for and 17 against the Union. There were 5 challenged ballots. On July 25, 1967, the Respondent filed timely objections to conduct affecting the results of the election. On September 1, 1967, the Regional Director, after investigation, issued a Report on Objections in which he recommended that the objections be overruled in their entirety and that the Union be certified as the exclusive representative of the employees in the appropriate unit. Thereafter, on September 7, 1967, Respondent filed Exceptions to the Report on Objections, requesting review by the Board of the Regional Director's Report on Objections. On October 20, 1967, the Board issued its Decision and Certification of Representative, in which it adopted the Regional Director's findings and recommendations, saying that "The Employer's exceptions, in our opinion, raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's finding and recommendations or require a hearing." Accordingly, the Board certified the Union as the representative of the employees in the appropriate unit. On November 7, 1967, Respondent filed a Request to Review and Reconsider the Board's Decision and the record. On November 17, 1967, the Board denied Respondent's request as containing "nothing not previously considered by the Board."

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The Complaint Case

On December 1, 1967, the Union filed the unfair labor practice charge involved in the instant case, in which it alleged that since on or about October 27, 1967, and at all times since, the Respondent has refused to bargain collectively with the Union.

On December 15, 1967, the General Counsel, by the Regional Director of Region 26, issued a complaint and notice of hearing alleging that commencing on or about November 27, 1967, and at all times thereafter, Respondent has committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to bargain with the Union upon request. In due course the Respondent filed its answer to the complaint in which certain allegations of the complaint were admitted and others denied.

In its answer the Respondent admitted most of the material allegations of the complaint including the jurisdictional allegations, the appropriateness of the bargaining unit, the fact of the election, the certification, the Union's request to bargain and the Respondent's refusal. However, the answer averred that the certification was invalid and that Respondent was not afforded a hearing based upon his objections to the conduct affecting the results of the election. The Respondent admits refusing to bargain collectively with the Union but bases its refusal to recognize the Union upon "erroneous determinations" and deprivation of due process made by the . . . board" in its certification of the Union.

On January 5, 1968, counsel for General Counsel filed a Motion for Judgment on the Pleadings submitting that none of the details set forth in the Answer constitutes a valid defense to the allegations of the Complaint. It was

further submitted that the admissions contained in the Answer, considered together with the certification case, conclusively established the violations alleged in the complaint, and that no hearing is necessary.

On January 9, 1968, I issued an Order to Show Cause on the Motion for Judgment on the Pleadings in which the parties were directed to show cause on or before January 25, 1968, as to whether the Motion for Judgment on the Pleadings should be granted. On January 23, 1968, Respondent filed a Response to General Counsel's Motion for Judgment on the Pleadings and Order to Show Cause in which Respondent admitted most of the material allegations of General Counsel's Motion but contends that a valid defense exists to the allegations of the Complaint. Respondent asserts that its Answer together with the prior representation case constituted a valid defense. In addition, Respondent filed a Motion to Produce Evidence in which it is asserted that "certain documents and affidavits possessed and maintained by counsel for General Counsel be produced and made a part of the record." Respondent contends that a document known as Employer's Exhibit B has been omitted and not made a part of either this proceeding or the Report on Objections of the Regional Director. Respondent moves that "certain documents and investigatory affidavits possessed and maintained by counsel for the General Counsel" be produced and made a part of this proceeding or that alternatively, counsel for General Counsel's complaint be dismissed with prejudice. On January 30, 1968, counsel for General Counsel filed a Response to Motion of Respondent to Produce Evidence in which he asserts that the documents requested by Respondent were fully considered by the Regional Director and the matter considered by the Board and are therefore not matters to be reviewed by a Trial Examiner.

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Ruling on Motion for Summary Judgment on the Pleadings

The Respondent contends that the election and certification are invalid and that it is therefore under no legal obligation to meet with and bargain with the Union. However, it is clear that all material issues of fact and law in this regard have been decided by the Board.

The questions of the validity of the election, the merit of the Respondent's objections to it, and whether the Union should be certified as the collective bargaining representative were decided by the Board in the representation proceeding. It is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances not to permit litigation before a Trial Examiner in a complaint case of issues which were or could have been litigated in a prior related representation proceeding.[2]

The Trial Examiner has no authority to review the Board's final disposition of the representation issues or to question its conclusions made on the existing record. The Respondent is free, in exceptions to this Decision, to request the Board to reconsider its conclusions, and in the event of an unfavorable final order by the Board may request review in an appropriate court of appeals. At this

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[2] **N. L. R. B. v. Macomb Pottery Company et al.**, 376 F. 2d 450 (7th Cir. 1967); **Howard Johnson Company**, 164 NLRB No. 121; **Metropolitan Life Insurance Company**, 163 NLRB No. 71; See **Pittsburgh Plate Glass Co. v. N. L. R. B.**, 313 U. S. 146, 162 (1941); Rules and Regulations, National Labor Relations Board, Series 8, as revised January 1, 1965, sec. 102.67(f).

In the case of **Baumritter Corporation et al. v. N. L. R. B.**, 386 F. 2d 117 (C. A. 1, 1967), the Court said:

> The Board is bound by its own prior determinations in the representation proceedings in the absence of newly discovered evidence. Hence, the Board was not required to grant a hearing and did not abuse its discretion in denying these requests.

stage of the proceedings, however, absent newly discovered or previously unavailable evidence or special circumstances, the Board's disposition of the representation matter is the law of the case and binding on the Trial Examiner. No such evidence or circumstances are asserted or offered by the Respondent here.

The refusal to bargain being conceded, there is no issue litigable before a Trial Examiner, and therefore no matter is the law of the case and binding on the Trial Board and the Trial Examiner have authority to enter summary judgment.

It is concluded that summary judgment on the pleadings is appropriate here.

There remains the Respondent's Motion to Produce Evidence. Counsel for General Counsel objects to the production of the evidence requested by Respondent in that they have previously been considered by the Board, and are therefore not subject to review by a Trial Examiner.

With respect to the request by Respondent for the production of "certain documents and investigatory affidavits possessed and maintained by General Counsel," it is to be noted that rulings by the Trial Examiner granting similar motions were reversed by the Board in **LTV Electrosystems, Inc.**, 166 NLRB No. 81 and in **Golden Age Beverage Company**, 167 NLRB No. 24. In view of this authority the Respondent's request for inclusion of the aforesaid material as a part of the record in this proceeding is denied. See also **Intertype Company v. Pennello**, 64 LRRM 2590 (U. S. D. C., W. D. Va., 1967). The General Counsel's Motion for Summary Judgment on the Pleadings is granted, and I hereby make the following further:

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Findings and Conclusions

I. The Business of the Respondent

Dean Foods Company, Inc., the Respondent, is a Michigan Corporation with its principal office and place of business located in Memphis, Tennessee, where it is engaged in the manufacture of dairy products. During the past 12-month period, which period is representative of all times material herein, Respondent purchased and received goods and products valued in excess of $50,000 directly from points located outside the State of Tennessee and during the same period, sold and shipped from its Memphis, Tennessee, plant, products valued in excess of $50,000 directly to points outside the State of Tennessee.

Respondent is an employer engaged in commerce within the meaning of Section 2(6) of the Act.

II. The Labor Organization Involved

The Union is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at Respondent's plant at 2040 Madison Avenue, Memphis, Tennessee, including cooler workers, pure-pak operators and maintenance men, pasteurizer operators, cheese makers, glass filler operators, receiving men, case room checkers, semi-trailer drivers, laboratory workers, butter printers, cheese packing operators,

and all helpers in said classifications, truck and maintenance mechanics, and plant clerical employees and working leadmen; excluding executive and administrative employees, supervisors and superintendents, office clerical employees and guards, and all other employees.

On July 20, 1967, a majority of Respondent's employees in the appropriate unit selected the Union as their collective bargaining representative in a secret ballot election conducted under the supervision of the Regional Director for Region 26 of the National Labor Relations Board.

On October 20, 1967, the National Labor Relations Board, after consideration of Respondent's objection to the above-described election, certified the Union as the exclusive collective bargaining agent of the employees in the said unit.

At all times since July 20, 1967, the Union, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all employees in the appropriate unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On or about November 21, 1967, the Union requested Respondent to bargain collectively with the Union as the exclusive collective bargaining representative of Respondent's employees in the appropriate unit.

On or about November 27, 1967, Respondent refused to bargain collectively with the Union as such representative.

By such action the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) of the Act and has interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

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The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions, and the entire record in the case, I recommend that the Board issue the following:

Order

A. For the purpose of determining the duration of the certification the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.[3]

B. Dean Foods Company, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive collective bargaining representative of the employees in the following appropriate bargaining unit:

> All production and maintenance employees at Respondent's plant at 2040 Memphis Avenue, Memphis, Tennessee, including cooler workers, pure-pak operators and maintenance men, pasteurizer operators, cheese makers, glass filler operators, receiving men, case room checkers, semi-trailer drivers, laboratory workers, butter printers, cheese packing operators, and all helpers in said classifications, truck and maintenance mechanics, and plant clerical employees and working leadmen; excluding executive and adminis-

[3] The purpose of this provision is to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law. See **Mar-Jac Poultry Co., Inc.**, 136 NLRB 785; **Commerce Co. d/b/a Lamar Hotel**, 140 NLRB 226, 229, 328 F. 2d 600 (C. A. 5), cert. den. 379 U. S. 817 (1964); **Burnett Construction Co.**, 149 NLRB 1419, 1421, 350 F. 2d 57 (C. A. 10, 1965).

trative employees, supervisors and superintendents, office clerical employees and guards, and all other employees.

(b) Interfering with the efforts of said Union to negotiate for or represent employees as an exclusive collective bargaining representative, or in any like or related manner interfering with employee efforts at self-organization.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its Memphis, Tennessee, plant, copies of the notice attached hereto marked "Appendix."[4] Copies of said notice, on forms to be furnished by the Regional Director for Region 26, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices of employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[4] In the event this recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

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(c) Notify the Regional Director for Region 26, in writing, within 20 days from receipt of this recommended Order what steps it has taken to comply herewith.[5]

Dated at Washington, D. C., Feb. 16, 1968.

/s/ Charles W. Schneider
Charles W. Schneider
Trial Examiner

TXD-111-68

NOTICE TO ALL EMPLOYEES

Pursuant to
The Recommendations of a Trial Examiner of the
National Labor Relations Board
and in order to effectuate the policies of the
National Labor Relations Act

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, as the exclusive collective bargaining representative of all our employees in the following appropriate unit:

All production and maintenance employees at our plant at 2040 Madison Avenue, Memphis, Tennessee, including cooler workers, pure-pak operators and maintenance men, pasteurizer operators, cheese makers, glass filler operators, receiving men, case room checkers, semi-trailer drivers, laboratory workers, butter printers, cheese packing

[5] In the event these recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 26, in writing, within 10 days from receipt of this Order what steps the Respondent has taken to comply herewith."

operators, and all helpers in said classifications, truck and maintenance mechanics and plant clerical employees and working leadmen; excluding executive and administrative employees, supervisors and superintendents, office clerical employees and guards, and all other employees.

WE WILL NOT interfere with the efforts of the Union to negotiate for or represent employees in the apropriate unit as collective bargaining representative, or in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights under the Act.

WE WILL bargain collectively with the Union as exclusive collective bargaining representative of the employees in the appropriate unit and if an understanding is reached we will sign a contract with the Union.

Dean Foods Company, Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103 (Tel. No. 534-3161).

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APPENDIX E

Memphis, Tennessee

United States of America
Before the National Labor Relations Board

Dean Foods Company, Inc., Employer, and Oil, Chemical and Atomic Workers International Union, AFL-CIO, Petitioner.	Case No. 26-RC-2925.

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulation for Certification upon Consent Election, an election by secret ballot was conducted on July 20, 1967, under the direction and supervision of the Regional Director for Region 26 among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished a tally of ballots, which showed that of approximately 50 eligible voters, 45 cast ballots, of which 23 were for and 17 were against the Petitioner. There were 5 challenged ballots. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

In accordance with the Rules and Regulations of the National Labor Relations Board, the Regional Director conducted an investigation and, on September 1, 1967, issued and duly served upon the parties his Report on Objections in which he recommended that the objections

be overruled and that the Petitioner be certified as the collective-bargaining representative of the employees involved. Thereafter, the Employer filed timely exceptions to the Regional Director's Report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that all production and maintenance employees of Dean Foods Company, Inc., at its plant at 2040 Madison Avenue, Memphis, Tennessee, including cooler workers, pure-pak operators and maintenance men, pasteurizer operators, cheese makers, glass filler operators, receiving men, case room checkers, semi-trailer drivers, laboratory workers, butter printers, cheese packing operators and all helpers in said classifications, truck and maintenance mechanics, and plant clerical employees and working leadmen; excluding all other employees on company payroll at the above address, including executive and administrative employees, supervisors and superintendents, office clerical employees and guards, constitute a unit appropriate for the purposes of

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collective bargaining within the meaning of Section 9(b) of the Act.

5. The Board has considered the Employer's objections, the Regional Director's Report, and the Employer's exceptions thereto, and hereby adopts the Regional Director's findings and recommendations.[1]

Accordingly, as the tally shows the Petitioner has obtained a majority of the valid ballots cast, we shall certify it as the collective-bargaining representative of the employees in the appropriate unit.

Certification of Representative

It Is Hereby Certified that Oil, Chemical and Atomic Workers International Union, AFL-CIO, has been designated and selected by a majority of the employees, in the unit found appropriate herein, as their representative for the purposes of collective bargaining and that, pursuant to Section 9(a) of the Act, the said labor organization is the exclusive representative of all employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Dated, Washington, D. C., Oct. 20, 1967.

.....
John H. Fanning, Member

.....
Howard Jenkins, Jr., Member

.....
Sam Zagoria, Member

(Seal) National Labor Relations Board

[1] The Employer's exceptions, in our opinion, raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's findings and recommendations or require a hearing.

APPENDIX F

United States of America Before the
National Labor Relations Board
Twenty-Sixth Region

Dean Foods Company, Inc., Employer, and Oil, Chemical and Atomic Workers International Union, AFL-CIO, Petitioner.	Case No. 26-RC-2925

REPORT ON OBJECTIONS

Based upon a petition filed May 8, 1967, and pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for the Twenty-sixth Region on May 31, 1967, an election by secret ballot was conducted on July 20, 1967, among certain employees[1] of the Employer at its Memphis, Tennessee, plant.

The results of the election as disclosed by the Tally of Ballots served upon the parties at the conclusion of the election are as follows:

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[1] All production and maintenance employees of Dean Foods Company, Inc., at its plant at 2040 Madison Avenue, Memphis, Tennessee, including cooler workers, pure-pak operators and maintenance men, pasteurizer operators, cheese makers, glass filler operators, receiving men, case room checkers, semi-trailer drivers, laboratory workers, butter printers, cheese packing operators and all helpers in said classifications, truck and maintenance mechanics, and plant clerical employees and working leadmen; excluding all other employees on company payroll at the above address, including executive and administrative employees, supervisors and superintendents, office clerical employees and guards.

Approximate number of eligible voters 50
Void ballots 0
Votes cast for Petitioner 23
Votes cast against participating labor organization 17
Valid votes counted 40
Challenged ballots 5
Valid votes counted plus challenged ballots....45
Challenges are not sufficient in number to affect the results of the election.
A majority of the valid votes counted plus challenged ballots has been cast for Petitioner.

On July 25, 1967, the Employer filed timely objections to conduct affecting the results of the election, a copy of which was duly served upon the Petitioner. The Employer's objections are as follows:

1. The Union distributed literature on the day of the election that was stolen from the Company's files at a time so close to the holding of the election that the Company did not have an adequate opportunity to reply, and that additionally, such stolen Company memoranda had such an affect as to totally mislead and antagonize the eligible employees against the Company and its management personnel.

2. The Union adamantly insisted that it use, as its authorized Observer during the election period one Robert Tribble who had been challenged by the Company's representative as both ineligible to vote in the election and ineligible to represent the Union's interests as an Observer during the holding of the election.

3. The Union issued false and misleading statements during its pre-election meetings and confrontations with the employees and further raised the issue of racial discrimination to incite hostility and coerce

the employees in the exercise of their freedom of choice during the election period.

4. The Union made vigorous attempts throughout the pre-election period to coerce certain eligible employees to file and participate in bringing unmeritorious and false charges against the employer and his agents which also adversely affected the freedom of choice of the eligible employees during the election period.

5. The Union by other means threatened, coerced, and intimidated eligible employees so that a free and fair election could not, and was not, conducted on the 20th day of July 1967.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the objections to be made, during which all parties were afforded full opportunity to submit evidence bearing on the issues, and the undersigned, having duly considered the results thereof, reports as follows:

THE OBJECTIONS:

Objection 1:

As to this objection, it is the Employer's contention that the Petitioner, by some unknown means, came into possession of a confidential memorandum, a copy attached hereto as Exhibit A, addressed to "ALL SUPERVISORY PERSONNEL" relative to a change in the Employer's vacation plan.

The Employer further contends that it first learned that the employees were aware of the contents of this memorandum at approximately 9 a. m. on July 19, 1967, the day preceding the scheduled election, and it did not

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have an adequate opportunity to explain to its employees the contents of the memorandum.

The Employer asserts that if it had had an opportunity to explain the contents of the memorandum to its employees, it would have explained to them that this was a company-wide policy for supervisors, that the supervisors sometimes worked 60 hours a week and were deserving of the increase, and that the reference to labor negotiations in the memorandum referred to contract negotiations at other operations of the Employer and did not have anything to do with the election at its Memphis operation.

The plant superintendent testified that the subject memorandum was received by the Employer from its Chicago office in the latter part of May 1967, and sealed copies were distributed to its supervisory personnel. On or about June 1, 1967, it was discovered that a copy distributed to the laboratory supervisor was missing from his file basket where it had been placed pending his return from a leave of absence.

The Employer's plant superintendent, Wesley Hollis, testified that at approximately 9 a. m. on July 19, 1967, he observed that a copy of the subject memorandum was placed in each slot of one of the timecard racks located in the canteen. He also testified that a copy of the memorandum was placed on each of the four bulletin boards throughout the plant. He further testified that he thought the damage had already been done and he, therefore, did not remove the copies from the timecard rack. Hollis stated that there were only nine employees working on July 19, 1967, and the Employer did not think it would do much good to reply to the memorandum since it could not make any explanation after 2 p. m., July 19, 1967, because the election was scheduled to be held at 2 p. m. on the following day, and the normal work force would not be at the plant until the day of the election.

Hollis further testified that at approximately 9:30 p. m. on July 19, 1967, a rank and file employee volunteered the information to him that copies of the subject memorandum were distributed at a union meeting held on July 18, 1967, and that the employee was going to vote against the Union, but after he saw the memorandum, he changed his mind. The employee testified that he had made up his mind as to how he would vote long before he saw the memorandum and that the memorandum did not influence his vote.

The Employer's maintenance supervisor, Joe Howles, testified that at approximately 5 p. m., after the voting had concluded, during a conversation with a rank and file employee regarding the election and unions generally, the employee pulled a letter from his pocket and said, "Here was the main thing that got them." In response to Howles' question, the employee opened the letter, laid it on the desk and said, "Wimberly is the one who goofed. We got it, we photostated it and circulated it through the union meeting." The employee then pointed to the last paragraph of the memorandum where three or four lines were underlined and said, "This is what really hurt you."

The employee testified that the conversation in which he pulled the memorandum out of his pocket occurred on the day before the election. He states that he had a copy of the memorandum in his pocket and when he went into the work area he went up to Howles, pulled the letter out of his pocket and said something like, "Your letter got out." He further states that Howles laughed and said that it wasn't his letter; that his letter was at home in the drawer; and that Howles did not question him as to what occurred at the union meeting or whether the letter had any effect on the men. This employee further testified that he never told Howles that the memorandum was the thing that hurt the Employer.

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Petitioner's International Representative Hugh B. Owen testified that on either July 14 or 15, 1967, he received the vacation memorandum "anonymously" through the mail in a plain white envelope. At the union meeting of July 18, 1967, the memorandum was read aloud to those present and one employee mentioned that he had seen it before. Owen, when asked to read it again, made approximately seven photostatic copies, distributing them among the approximately 15 employees present. Owen testified that he gave no instructions to distribute these leaflets at the plant and that he does not know who, in fact, did distribute them at the plant. Owen further testified that the copies photostated by the Union were brown-tinted and did not have the phrase, "THIS IS WHAT THE CO. THINKS OF US," as did the black-tinted copies found in the plant. Owen's testimony as to what occurred at the union meeting was corroborated by various employees who attended the meeting.

In view of the foregoing, it is apparent that by 9 a. m. of the day before the election the Employer was aware of the publication and distribution of its memorandum and, if the testimony of the plant manager is credited, by 9:30 p. m. of the same day it was aware of the alleged impact of the memorandum upon one employee. Despite this intelligence, the Employer neglected to take any action to counteract any misunderstandings caused by its memorandum. Since the election was not scheduled to begin until 2 p. m. of the following day, and in view of the small size of the voting unit, the Employer's contention that it did not have time to take corrective action is rejected.

As the evidence submitted or adduced by the investigation does not support a finding that the Petitioner was in any way responsible for the misappropriation of company correspondence and as the Employer had ade-

quate opportunity to explain the memorandum, no merit is found to this objection.

Accordingly, it is recommended that Objection 1 be overruled.

Objection 2:

As to this objection, the Employer's position, through counsel, is as follows:

> Counsel submits that, one, because Tribble was a principal union adherent and that; two, he apparently filled himself with ostencibly (sic) confidential information of the company and that; three, he distributed this "information" distortedly to the employees and that; four, he was probably compensated for his efforts and that; five, he indeed had resigned from his employment status with the company and that; six, he served as the union's observer and representative during the holding of the election and that; seven, the company expressed its objection to him serving in that capacity during the conducting of such election, therefore Tribble's presence preceding and during said election so adversely affected the "laboratory conditions" that are required to prevail during the holding of said election, that it interfered with the freedom of choice during the election period of the remaining employees.

The Employer's first contention that Tribble was a principal union adherent is not a basis for disqualifying Tribble as the Union's observer.

In support of the second and third contentions, the plant superintendent testified that rank and file employees told him that Tribble had said the Company was making enough money to support two other plants and that connections around the plant gave him this information. Plant Superintendent Hollis further testified that he

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heard Tribble tell another employee that the employees of the Employer's Conway, Arkansas, plant received 35 cents Sunday premium pay, while the Employer's Memphis employees received only 10 cents Sunday premium pay. The collective bargaining agreement covering the Employer's Conway employees provides for a 35-cent premium for Sunday work.

It is found that the first remark attributed to Tribble, even if made, was innocuous and the second remark, if made, was correct and truthful.

The Employer admittedly had no evidence to submit in support of its contention 4, and none was adduced during the course of the investigation.

As to the Employer's contentions 5, 6 and 7, the investigation disclosed that on June 28, 1967, Tribble tendered his written resignation to be effective on July 29, 1967. Tribble acted as the Petitioner's observer during the election over the Employer's objections. As the Petitioner insisted upon using Tribble as its observer, the Board agent proceeded with the election notwithstanding the Employer's objections. As Tribble was employed on the payroll eligibility date and on the date of the election, he was still an employee of the Employer and an eligible voter.

In view of the foregoing, it is found that Tribble was qualified to serve as the Petitioner's observer and no merit is found to this objection.

Accordingly, it is recommended that Objection 2 be overruled.

Objection 3:

In support of this objection the Employer's plant superintendent, Hollis, testified that he was informed by an employee that the employee received several telephone

calls accusing the Employer of discriminating against its Negro employees. The employee testified that during the early part of June 1967 he had heard that Superintendent Hollis had gone around to the men in the bottling department telling them that if the Union came in the colored employees with more seniority would bump them and get the better jobs. Because of these rumors the employee asked Maintenance Supervisor Howles to arrange a meeting with Superintendent Hollis. The following day they met in the Maintenance Shop at which time the employee told Hollis that he had heard rumors that Hollis was trying to "play off" the colored against the white and was using him as a reference. He told Hollis that he did not know if Hollis actually spread the rumors but asked Hollis to leave his name out of it because he was not having anything to do with it. He also told Hollis that he didn't intend for people to start calling him again like they did the last time, referring to a previous election. The employee further testified that he did not tell Hollis that anyone had been calling him during the current campaign. The employee's testimony is corroborated by Supervisor Howles, who was present during the conversation. Hollis admitted that he told two employees that he understood that if the Union came in, the Company would follow seniority but he denied that he mentioned the racial issue or said the colored employees would get their jobs if the Company went by seniority.

Hollis further testified that another employee advised him that at a union meeting Union Representative Owen solicited signatures for a petition which accused the Employer of discriminating against its Negro employees. The employee denied making such a statement to Hollis and testified that no such petition was ever circulated. Owen testified that at no time did he ever solicit signatures for such a petition or ever raise the racial issue

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during the campaign. An examination of the Petitioner's campaign literature revealed it was devoid of any racial propaganda.

In view of the foregoing, it is found that the Petitioner did not issue false and misleading statements or raise the issue of racial discrimination, and no merit is found to this objection.

Accordingly, it is recommended that Objection 3 be overruled.

Objection 4:

In support of this objection Superintendent Hollis testified that an employee reported that Union Representative Owen had asked whether the employee had been offered a raise to stay on his job and if so, whether he would sign an affidavit to that effect. Owen allegedly told the employee that if charges were filed, the Union could become the bargaining representative without an election.

Owen testified that the employee mentioned hearing a rumor that he might be given a raise to induce him to remain on his old job. The employee asked Owen if the raise would be a violation of the law and Owen replied that there would be grounds for an unfair labor practice charge only if it could be proven that the employee was given the raise to influence his vote. Both Owen and the employee deny that Owen solicited an affidavit or the filing of a charge.

Assuming *arguendo,* that the incident occurred as alleged by the Employer, it cannot be reasonably found that it interfered with the voter's freedom of choice and is no basis for setting the election aside.

Accordingly, it is recommended that Objection 4 be overruled.

Objection 5:

In support of this objection the Employer's maintenance superintendent, Howles, testified that after the election an employee told him during the course of a conversation regarding the election and unions generally that the Company wasted their money on these lawyers because the Union knew what was coming out of the lawyer's office before the Company. The employee also made a remark about there being a leak in the lawyer's office. Howles could not recall whether or not the employee mentioned a specific fee paid the lawyer.

The employee to whom this remark is attributed testified that during the above-mentioned conversation with Howles he informed him it was a big waste of money spending $5,000 or $10,000 or more when the employees already had their minds made up. He further testified that he told Howles there was either a leak in the lawyer's office or the Union had dealt with them before because the Union knew pretty much what type of things lawyers would do, indicating it was his own observation.

Petitioner's Representative Owen testified that he did not tell the employee that the Employer was paying a lawyer $5,000 to keep the Union out but probably mentioned that the Company had lawyers to advise and help keep the Union out.

In view of the foregoing and assuming *arguendo* that the remark attributed to Petitioner's Representative Owen was made, such statements, even if false, are not of such a nature to warrant setting the election aside,[2] and no merit is found to this allegation.

Also in support of this objection Superintendent Hollis testified that an employee told him that Petitioner's Rep-

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[2] **Hill Brothers**, 114 NLRB 164.

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resentative Owen at a union meeting told the employees that if the Union did not win the election it would boycott the Employer's product.

The employee denied that Owen had made such a statement, denied reporting such a statement to Hollis, and Owen denied ever mentioning a boycott. Other employee witnesses were interviewed and in their testimony specifically denied hearing any union representative at any time making any comments about boycotting the Employer or its products and no merit is found to this portion of this objection.

Accordingly, it is recommended that Objection 5 be overruled.

Conclusions and Recommendations

Having recommended that the Employer's objections be overruled in their entirety, and as the Tally of Ballots reveals the Petitioner received a majority of the valid votes cast, it is further recommended that the Board certify the Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of the employees employed in the unit herein involved within the meaning of Section 9(a) of the Act.

Dated at Memphis, Tennessee, this 1st day of September 1967.

/s/ John J. A. Reynolds, Jr.
John J. A. Reynolds, Jr., Director
Twenty-Sixth Region
National Labor Relations Board
746 Federal Office Building
167 North Main Street
Memphis, Tennessee 38103

EXHIBIT A

THIS IS WHAT THE CO. THINKS OF US.

May 22, 1967

M
E
M
O

ALL SUPERVISORY PERSONNEL

Effective June 1, 1967 the following vacation program will be in effect for all non-union salaried employees of the Dean Foods Company:

2 weeks after 1 year of service
3 weeks after 5 years of service
4 weeks after 10 years of service

The addition of 4 weeks vacation after 10 years is a significant improvement in our program. The third and fourth weeks should be scheduled with the approval of the employee's immediate supervisor. Do not post this notice, and please inform the employees under your supervision personally since this change in our vacation plan could have an adverse effect on labor negotiations. If you have any questions regarding this contact me.

John Linton

JL:bw

In the

Supreme Court of the United States

October Term, 1970

No. .....

Dean Foods Company, Inc.,
Petitioner,
vs.
National Labor Relations Board,
Respondent.
} No. .....

Certificate and Proof of Service

Pursuant to Supreme Court Rules, Rule 33 (3), I, Newell N. Fowler, one of the Attorneys for Dean Foods Company, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of April, 1970, have caused to be served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States and on several parties thereto as follows:

1. The United States by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530.

2. On the National Labor Relations Board by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to Arnold Ordman, Esquire,

General Counsel, at the Office of the Board, 17[illegible] Pennsylvania Avenue, N. W., Washington, D. [illegible] 20570.

Signed: Newell N. Fowler
Newell N. Fowler
Fowler, Brackhahn, Young & Per[illegible]
Memphis Bank Building
44 North Second Street
Memphis, Tennessee 38103
Attorneys for Dean Foo[illegible]
Company, Inc.

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384-638—70

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1442

DEAN FOODS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2–4) is reported at 421 F. 2d 664. The Board's decision and order (Pet. App. A5–18) are reported at 171 NLRB No. 60.

JURISDICTION

The order of the court of appeals (Pet. App. A1) was entered on January 20, 1970, and a petition for rehearing was denied on March 4, 1970. The petition for a writ of certiorari was filed on April 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where the employer's objections to a representation election presented no material factual issues, the Board properly overruled the objections without holding an evidentiary hearing.

2. Whether the Board reasonably concluded that the employer's objections to the representation election did not warrant setting aside the election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 3–5 of the petition.

STATEMENT

On July 20, 1967, pursuant to a Stipulation for Certification Upon Consent Election (Pet. App. A8),[1] the Board's Regional Director conducted an election among the Company's production and maintenance employees, which the Union won.[2] On July 25, the Company filed objections to the election (*ibid.*; R. 9–10).[3] Pursuant to the Board's Rules and Regulations[4]

[1] Section 102.62(b) of the Board's Rules and Regulations (29 CFR 102.62(b)) provides that the employer and the union, with the approval of the Regional Director, may "enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary."

[2] Oil, Chemical and Atomic Workers International Union, AFL–CIO.

[3] "R." references are to the appendix in the court below.

[4] Section 102.69 (c) and (e) (29 C.F.R. 102.69 (c), (e)), of the rules provides:

"(c) If objections are filed to the conduct of the election or conduct affecting the result of the election * * * the regional

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the Regional Director conducted an administrative investigation of the issues raised by the objections, in which the parties were given an opportunity to submit relevant evidence. On September 1, the Regional Director issued his report, concluding that the objections were without merit and recommending that they be overruled (Pet. App. A8, A22–33). The Company's relevant objections,[5] the facts developed in the investigation, and the Director's findings and conclusions are as follows:

1. The Company alleged that:

> The Union distributed literature on the day of the election that was stolen from the Company's files at a time so close to the holding of

director shall investigate such objections * * *. If a consent election has been held pursuant to section 102.62(b) [as was the case here], the regional director shall prepare and cause to be served * * * a report on * * * objections * * * including his recommendations * * *. Within 10 days from the date of issuance of the report on * * * objections * * * any party may file with the Board in Washington, D.C., eight copies of exceptions to such report, with supporting brief if desired * * *."

"(e) In a case involving a consent election held pursuant to section 102.69(b), if exceptions are filed, * * * to the report on * * * objections, * * * and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. * * * If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer. * * *"

[5] The Company filed five objections; however, since the Company did not contest before the Board the Regional Director's adverse rulings with respect to objections 2, 3, and 5 (R. 9–10), further review of those rulings is foreclosed.

> the election that the Company did not have an adequate opportunity to reply, and * * * such stolen Company memoranda had such an affect [*sic*] as to totally mislead and antagonize the eligible employees against the company * * *. [Pet. App. A23; R 9.]

The memorandum in question, which was directed to "All Supervisory Personnel," announced an improved vacation program "for all non-union salaried employees" and stated: "Do not post this notice, and please inform the employees under your supervision personally since this change in our vacation plan could have an adverse effect on labor negotiations" (Pet. App. A34). According to Company Plant Superintendent Wesley Hollis, the memorandum was received from the Company's Chicago office in May 1967, and sealed copies were distributed to all supervisory personnel. Hollis further stated that, on or about June 1, 1967, he noticed that a copy distributed to the laboratory supervisor was missing from his file basket, where it had been placed pending his return from a leave of absence; that at 9 a.m., on July 19, 1967, he observed that a copy of the memorandum was placed in each employee's slot on the time clock, and a copy was on each of the Company's four bulletin boards; and that at 9:30 p.m., on July 19, a rank-and-file employee informed him that copies of the memorandum had been distributed at a union meeting the previous evening, and that because of the memorandum he had changed his mind and would vote for the Union (Pet. App. A25–26). Finally, Hollis stated that, since July 19 was the day off for all but nine of the

Company's work force, the Company did not think it would do much good to reply to the memorandum (Pet. App. A25).

Union Representative Owen stated that, on July 14 or 15, 1967, he received the vacation memorandum anonymously through the mail in a plain white envelope. He further stated, as did various employees who attended, that, at a union meeting on July 18, he read the memorandum aloud to the approximately 15 employees who were present; that one employee mentioned seeing it before; that, when asked to read it again, he made about 7 photostatic copies, distributing them to the 15 employees present; and that these copies were brown-tinted and did not contain the addition, "This is what the Company thinks of us," as did the black-tinted copies found in the plant. Finally, Owen stated that he gave no instructions to distribute these leaflets at the plant and did not know who distributed them. (Pet. App. A27.)

On the basis of the foregoing facts, the Regional Director found that by 9 a.m. of the day before the election the Company was aware of the distribution of the memorandum; that by 9:30 p.m. on the same day it was aware of the alleged impact of the memorandum upon at least one employee; and that despite this knowledge the Company neglected to take action to counteract any misunderstanding caused by the memorandum. The Regional Director concluded that, since the election was not scheduled until 2 p.m. on July 20, 1967, and the size of the unit was small (50 employees), the Company had an adequate opportunity to take such corrective action. He further con-

cluded that the evidence adduced by the investigation did not support a finding that the Union was in any way responsible for the misappropriation of the Company memorandum. (Pet. App. A27–28.)

2. The Company also objected on the ground that prior to the election the Union "made vigorous attempts * * * to coerce certain eligible employees to file and participate in bringing unmeritorious and false charges against the employer and his agents," thereby adversely affecting the employees' freedom of choice (Pet. App. A24). In support of this objection, Superintendent Hollis stated that an employee reported that Union Representative Owen had asked whether he had been offered a raise to stay on his job and, if so, whether he would sign an affidavit to that effect. According to Hollis, the employee also reported that Owen had said that, if charges were filed, the Union could become the bargaining representative without an election. The Regional Director concluded that, assuming *arguendo* that the incident occurred, it could not reasonably be found that it interfered with the voters' freedom of choice, and thus it afforded no basis for setting the election aside. (Pet. App. A31.)

Accordingly, the Regional Director recommended to the Board that the Union be certified (Pet. App. A33). The Company filed exceptions to the Regional Director's report (Pet. App. A8; R. 23–32). As to the first objection, the Company again contended that it did not have adequate time to explain the memorandum. The Company added that it was not concerned with the identity of whoever misappropriated the memorandum (R. 26–27). Similarly, as to the other

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objection, the Company did not dispute the Regional Director's summary of Superintendent Hollis' version of the incident, but merely contested the Director's finding that, "assuming arguendo that the incident occurred as alleged by the Employer, it cannot be reasonably found that it interfered with the voters' freedom of choice" (R. 27).[4] The Company requested the Board either to set the election aside, or to conduct a hearing "to resolve remaining issues of credibility and fact that the Regional Director has omitted from his conclusion" (R. 31).

The Board ruled that the Company's objections and exceptions to the Regional Director's report "raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's findings and recommendations or require a hearing" (Pet. App. A21, n. 1). Accordingly, the Board adopted those findings and recommendations, and certified the Union as the exclusive bargaining representative of the Company's employees (Pet. App. A2). The Board thereafter denied the Company's request for reconsideration (Pet. App. A8).

The Company refused to bargain with the Union; and an unfair labor practice complaint was issued by the Board's General Counsel, who, after the Company had filed an answer, moved for summary judgment on the pleadings (Pet. App. A9). The Trial Examiner granted the General Counsel's motion, finding that the Company had raised no issue which had not been

[4] The Company's additional exceptions (R. 30–31) are not relevant to the petition in this Court.

previously considered and rejected by the Board in the representation proceeding (Pet. App. A11–12).

The Board adopted the Trial Examiner's finding that the Company violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union (Pet. App. A5). The Board ordered the Company to cease and desist from the unfair labor practices found, and to bargain with the Union upon request (Pet. App. A15–18).

The court of appeals, in a *per curiam* opinion, sustained the Board's findings and conclusions, and enforced its order (Pet. App. A2–4).

ARGUMENT

1. The first question raised in the petition (Pet. 2)—whether the Board is required to give plenary review to a Regional Director's report on objections to an election before entering an unfair labor practice order—is not presented in this case because the Board did grant plenary review. The applicable Board rule (n. 4, *supra*) provides that, whenever either party to an election of the type involved here files exceptions to the Regional Director's report on objections, the Board will review the Director's challenged findings on the merits; and the Board did so here. *Pepsi-Cola Bottling Co.* v. *National Labor Relations Board*, 409 F. 2d 676 (C.A. 2), certiorari denied, 396 U.S. 904, is thus inapposite; there the function of determining representation issues had been delegated to the Regional Director, and the Board merely retained a discretionary right to review his decision. See *National*

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Labor Relations Board v. *The Process Corp.*, 412 F. 2d 215, 217–218 (C.A. 7).

2. The second question posed by petitioner (Pet. 3)—whether it was entitled to a hearing "to resolve evidentiary conflict"—similarly is not presented on this record. The Board's rules provide for a hearing on exceptions to a report on objections where "substantial and material factual issues" are raised (n. 4, *supra*), but there were no such issues here. As shown, in overruling the objections which are properly in issue, the Regional Director assumed the truth of petitioner's factual allegations, but found them to be legally insufficient to warrant setting aside the election (*supra*, pp. 5–6).[1]

3. Accordingly, the only question properly presented is whether the Board reasonably concluded that petitioner's objections did not justify setting aside the election. That question is primarily a matter for the sound discretion of the Board (*National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226), and does not warrant further review. In any event, the Board acted reasonably here (*see supra*, pp. 2–7).

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[1] The remaining allegations of factual conflict raised by petitioner relate to objections as to which it had not filed exceptions (n. 5, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1970.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1442

DEAN FOODS COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

Petitioner presents its Petition for a Rehearing of this Court's Order dated June 1, 1970, denying the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and in support thereof, respectfully shows the following:

GROUNDS FOR REHEARING

The reason that the Petition for Certiorari should be reconsidered and reheard is that in the past thirty (30) days another Circuit has spoken on the issue raised. Absolute conflict is now present between the circuits.

Petitioner herein, Dean Foods Company, Inc., filed its Petition for a Writ of Certiorari on April 17, 1970, with the Court. It raised as a fundamental issue, and reason for granting the Writ, that the Decision of the United States Court of Appeals for the Sixth Circuit below remains in conflict with a Decision of the Second Circuit with regard to expedited procedures promulgated by the National Labor Relations Board. Specifically, Petitioner raised the rule enunciated in **Pepsi Cola Bottling Company v. NLRB**, 409 F. 2d 676 (CA—2, 1969).[1]

Under the **Pepsi Cola** decision, the Second Circuit finds that the National Labor Relations Board, the Respondent below herein, must make its own finding of fact before it can conclude a company has committed an unfair labor practice. Simply, **Pepsi Cola**, supra, requires the Board itself to make its own findings and evidentiary appraisal concerning unfair labor practices which will stand independent from those findings of fact and conclusions of law rendered by a "subdelegatee"; more specifically, a Regional Director, or an agent of the Board.

The Petitioner herein has shown how it was afforded synonymous treatment before the Board as was the Employer before the Second Circuit in **Pepsi Cola**. In this respect the National Labor Relations Board, in its argument to the Court below and to its argument before this

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[1] Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, pages 16 through 21.

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Court, has admitted that the Board did not review the evidentiary facts in **Pepsi Cola**, supra. Conversely, it alleged that the Board did review the evidence in this matter. See, Brief in Opposition for the National Labor Relations Board, page 8. However, it is remembered where the Board relates it considered the "entire record of this case" (J. A.-76) that actually the Board considered only, (1) the Trial Examiner's Decision, (2) Exceptions to that Decision, and (3) formal pleadings presented to the Trial Examiner, e. g., a Complaint, Answer, etc. Clearly, it cannot be contested that the Board did not determine, or even observe, facts, evidence, testimony or exhibits; such evidence was not presented to it under expedited procedures utilized herein, and equally so erroneously utilized in the **Pepsi Cola** determination. The Board did not "review"[2] the evidentiary determinations made by the Regional Director during the Representation stage.

Equally so, the Board deferred and refused from reviewing the evidence submitted at the unfair labor practice stage, and therefore evidentiary findings of fact were made by subdelegatees and **not** by the National Labor Relations Board as is statutorially required. See, Section 3 (b) of the Act, 29 U. S. C. A., Section 153 (b), as amended in 1959.

These circumstances and the erroneous treatment afforded to the Petitioner were specifically raised to the Court below (observe, Brief for the Dean Foods Company on Application for Enforcement of an Order of the National Labor Relations Board and Cross Petition to Review and Set Aside said Order, page 25 through page 29.)

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[2] The Board is most specific in disclosing what was "considered" upon "review". The Board adopted, without modification, the subdelegatees' findings after observing only, (1) the Employer's objections, (2) the Regional Director's Report, and (3) the Employer's Exceptions (Appendix E, p. 21).

Although the Petitioner was advised upon oral argument before the Court below that the **Pepsi Cola** decision and rule would be considered in its application to this case, the United States Court of Appeals for the Sixth Circuit in both its Decision and Order offered no comment or judicial finding resolving this issue. The Court was further reminded of its refusal to make this determination by a timely filed Petition for Rehearing on behalf of Dean Foods Company submitted February 20, 1970, pages five through eight. And upon Petitioner again raising the identical circumstances and issue before this Court, it was advised that its Petition for Writ of Certiorari was denied on June 1, 1970.

Nine days before that determination was rendered, the United States Court of Appeals for the First Circuit raised the **Pepsi Cola** rule directly, and upon its judicial analysis, rejected the rule of the Second Circuit. Observe, **NLRB v. Magnesium Casting Co.**, ... F. 2d ..., No. 7462, CA—1, May 21, 1970. It is noted that the United States Court of Appeals for the First Circuit had before this time apparently recognized the rule of **Pepsi Cola.** Observe, Chelsea Clock Co., 411 F. 2d 189, 192 (CA—1, 1969).

Therefore, during the intermediate time in which the Petition for Writ of Certiorari was presented to the Court herein, and subsequent denial rendered in June the United States Court of Appeals for the First Circuit substantially modified its formerly announced position regarding the expedited procedures utilized by the National Labor Relations Board and nine days before Certiorari was denied in this case, it directly rejected the determination of the United States Court of Appeals for the Second Circuit holding in **Pepsi Cola.** The First Circuit in **Magnesium Casting**, supra, reflected the conflicting rule of the Circuits by observing:

> "... there may be some merit to the proposition that discretionary review by the Board is not a sufficient

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guarantee of the exercise of the expertise attributed to the Board; that Section 10 (c) of the Act requires the Board to make its own determination of fact in unfair labor practice cases, see, **Universal Camera Corp. v. Labor Board,** 34 U. S. 474, 492 (1951); and the Congressional rejection of proposals to delegate final authority to hearing examiners suggests a similar reluctance to delegate such authority to Regional Directors, Pepsi-Cola Buffola Bottlers, supra, at 681."[3]

However, the First Circuit rejects the fact that there "may be some merit" to the rule of **Pepsi Cola** by apparently finding that Section 3 (b) of the Act delegates certain powers to Regional Directors, and further relying on comments by Senator Goldwater finds legislative intent demonstrating that this expedited procedure of using delegated authority is sufficient. And the First Circuit further suggests that it would be difficult "to see in what respect review of the actual record would have added to the Board's comprehension of the Company's contentions."

It would be redundant to submit that this Petitioner does not agree with any of the forementioned determinations made by the United States Court of Appeals for the First Circuit in **Magnesium Casting.** Specifically, Section 3 (b) of the Act did not delegate fact finding powers to subdelegatees, Regional Directors, under Section 10 of the Act; that dealing with unfair labor practices. Secondly, the remarks of Senator Goldwater cannot in any manner support the conclusion of the First Circuit. Thirdly, Petitioner submits that the only appropriate manner or means in which to review any determination of fact below is to observe **the actual record** (evidence and Exhibits submitted) rather than conclusionary opinion documents or formal pleadings as this Petitioner was so treated.

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[3] Advance sheet prepared and edited by the Bureau of National Affairs, cited as 74 LRRM 2234, 2237.

In this respect, the Petitioner is obviously not alone. The United States Court of Appeals for the Second Circuit does not agree with **Magnesium Casting** either, nor apparently does the United States Court of Appeals for the Fourth Circuit. Observe, **NLRB v. Clemen-Blythe Companys**, 415 F. 2d 78, 82 (CA—4, 1969).

As noted also, the United States Court of Appeals for the Seventh Circuit has confronted itself with the issue of the NLRB's expedited procedures. See, **State Farm Mutual Auto Insurance Co. v. NLRB**, 413 F. 2d 947 (CA—7) (1969), and **NLRB v. Process Corporation**, 412 F. 2d 215, 217-218 (CA—7) (1968). However, in both of these determinations before the Seventh Circuit evidentiary hearings, recorded testimony, exhibits, and evidence were presented for review. In this matter presently before the Court, no hearing was held at any stage of these proceedings,[4] although the company repeatedly requested that such a hearing be afforded to it consistently below.

Therefore, as of this date the United States Court of Appeals for the Second Circuit, and apparently the Fourth Circuit have approved the rule that when Unfair Labor Practices are presented to the Board, the Board itself **must** review the evidentiary issues submitted to it, rather than allowing a "subdelegatee" to make such determinations of fact and law. Conversely, the United States Court of Appeals for the First Circuit, and apparently the Seventh Circuit, disagree with this rule. Thirdly, the United States Court of Appeals for the Sixth Circuit, which rendered adjudication herein, refused to resolve the conflict and refrained from determining the issue as presented to it in any respect, whatsoever.

It is for these reasons and grounds that the Petitioner herein requests rehearing so as to require United States

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[4] All determinations of fact were made on an *ex parte* basis.

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Court of Appeals for the Sixth Circuit upon remand of this matter, to make a cogent analysis of this issue for the benefit of the bar, the judiciary, the Respondent and of course, the Petitioner herein. Or alternatively, that the Court grant certiorari over these parties and resolve the issue of conflict existing among the Circuit, so that a decisive determination be made as to the scope of the National Labor Relations Board's delegatory powers and Constitutional responsibilities of review under Section 3 (b) of the Act.

Can Section 10, powers of the Act be indirectly, although certainly, delegated to subordinate agents of the Board? i. e., the Regional Director's and/or Trial Examiners or must, the Board, itself, observe and determine the facts in unfair labor practice cases? Secondly, does Section 3(b) of the Act allow final disposition of all Section 9 questions when the Regional Director is the only forum of appeal and a party is then required to knowingly invoke Section 10 action to obtain review of such delegated determinations? Such a means of appeal is in itself against public policy! However, review by intentional violation is required to common practice before the National Labor Relations Board: See, **Boire v. Greyhound Corporation,** 376 U. S. 473, 476-477 (1964).

Without reconsideration and rehearing by the Court herein, Petitioner has not been judicially advised whether it is right (**Pepsi Cola**, *supra*) or converesly, wrong (**Magnesium Casting**, *supra*). But none the less, the Petitioner recognizes that equally so neither do the Circuits aforementioned, yet realize the correctness, or not, of their position.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted

FOWLER, BRACKHAHN, YOUNG & PERL

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Dated: June 23, 1970

Certificate of Counsel

I, Newell N. Fowler, Counsel for the above-named Petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that, it is restricted to the grounds specified in Rule 58, subdivision 2 of the Rules of this Court.

Newell N. Fowler
Counsel for Petitioner

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